

461

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 461

**HERBERT APTHEKER, ET AL.,
APPELLANTS,**

vs.

THE SECRETARY OF STATE.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FILED SEPTEMBER 11, 1963

PROBABLE JURISDICTION NOTED DECEMBER 2, 1963

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[fol. 4]

[File endorsement omitted]

**IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 3886-'62

HERBERT APTHEKER, 32 Ludlam Place, Brooklyn,
New York, Plaintiff,

v.

THE SECRETARY OF STATE, Department of State,
Washington, D. C., Defendant.

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF FROM
REVOCATION OF PASSPORT—Filed December 14, 1962**

The plaintiff, Herbert Aptheker, by his attorneys, complaining of the defendant, The Secretary of State of the United States, alleges:

1. The Court has jurisdiction of this action under sections 11-305 and 11-306 of the District of Columbia Code; sections 2201, 2282 and 2284 of 28 U.S. Code; and section 10 of the Administrative Procedure Act, 5 U.S. Code section 1009.
2. The plaintiff was born in the United States of America. He is now, and has at all times been since birth, a citizen of the United States of America.
3. On January 21, 1962, the plaintiff was the holder of a United States passport issued by the defendant.
4. On January 22, 1962, the Acting Director of the Passport Office of the Department of State notified the plaintiff that by direction of the defendant the plaintiff's passport was revoked because the Department of State believed that use by plaintiff of a United States passport would be in violation of section 6 of the Subversive Activities Control Act, 50 U.S. Code, section 785.

5. Thereafter, at the request of the plaintiff and pursuant to regulations issued by the defendant, an administrative hearing was held in the Department of State to [fol. 5] review the revocation of plaintiff's passport. The hearing culminated in a decision, dated October 26, 1962, by the Director of the Passport Office of the Department of State that the revocation of plaintiff's passport was required under section 6 of the Subversive Activities Control Act.

6. Pursuant to regulations of the defendant, the plaintiff appealed the decision of the Director of the Passport Office to the Board of Passport Appeals of the Department of State. Following a hearing before the Board, the Board found that "there is a preponderance of evidence in the record to show that at all material times, [the plaintiff] was a member of the Communist Party of the United States with knowledge or notice that such organization has been required to register as a Communist organization under the Subversive Activities Control Act." On the basis of this finding, the Board recommended to the defendant that he affirm the decision of the Passport Office to revoke plaintiff's passport.

7. On or about November 23, 1962, the defendant approved the recommendation of the Board of Passport Appeals, specifically adopted as his own the above-quoted finding of the Board, and on the basis of that finding confirmed the revocation of plaintiff's passport under section 6 of the Subversive Activities Control Act. Notice of the defendant's decision was given to plaintiff by a letter from the Department of State, dated November 26, 1962.

8. The plaintiff is an historian, political scientist, editor, teacher and lecturer. He is the author of numerous published books, pamphlets and articles. He desires to travel to countries of Europe and elsewhere for study and recreation, to observe social, political and economic conditions abroad, and thereafter to write, publish, teach and lecture in this country about his observations. He also desires to travel abroad in order to attend meetings of learned societies and to fulfill invitations to lecture abroad. The defendant's revocation of plaintiff's passport has

already prevented plaintiff from accepting invitations to lecture at Humboldt University and Dresden University, [fol. 6] both in Germany, and to attend and participate in a Congress of Historians held in Dresden, Germany, in October 1962.

9. Because of the action of the defendant in revoking his passport, plaintiff has been and is prohibited from traveling abroad as he desires. Moreover, because of the finding made by the defendant as the basis for his action, it would be futile for plaintiff to apply to the defendant for a new passport or for an extension or renewal of the passport which defendant has revoked. In addition, under sections 6 and 15 of the Subversive Activities Act and in consequence of the defendant's finding with respect to plaintiff, any such application would subject plaintiff to criminal prosecution.

10. The revocation of plaintiff's passport by defendant is unlawful in that section 6 of the Subversive Activities Control Act, upon which such revocation was based, is unconstitutional on its face and as applied to plaintiff, being (a) a deprivation without due process of law of plaintiff's constitutional liberty to travel abroad, in violation of the Fifth Amendment to the Constitution of the United States, (b) an abridgement of plaintiff's freedoms of speech, press and assembly, in violation of the First Amendment, (c) a penalty imposed on plaintiff without a judicial trial, and therefore a bill of attainder, in violation of Article I, section 9 of the Constitution, (d) a deprivation of plaintiff's right to trial by jury as required by the Fifth and Sixth Amendments and Article III, section 2, clause 3 of the Constitution, and (e) the imposition of a cruel and unusual punishment in violation of the Eighth Amendment.

11. Unless enjoined by the Court, the defendant will continue and keep in effect his revocation of plaintiff's passport and will refuse to issue or renew any passport to plaintiff.

12. The plaintiff has exhausted his administrative remedies.

13. The plaintiff is suffering irreparable injury from defendant's action, for which he has no adequate remedy at law.

Wherefore, plaintiff prays:

(1) That a three-judge court be convened to determine [fol. 7] this controversy pursuant to sections 2282 and 2284 of 28 U.S. Code; (2) That judgment be entered (a) declaring that section 6 of the Subversive Activities Control Act is repugnant to the Constitution of the United States; (b) enjoining and restraining the defendant from enforcing and executing against the plaintiff section 6 of that Act by reason of such repugnance, from continuing in effect his revocation of plaintiff's passport, and from denying to plaintiff the issuance or renewal of a passport; (c) ordering the defendant to reissue to plaintiff a valid United States passport of standard form and duration; and (d) granting such other and further relief as may be just and appropriate.

John J. Abt, 320 Broadway, New York City, N. Y.,

Joseph Forer, 711 14th St. N.W., Washington, D.C.,
Attorneys for Plaintiff.

[fol. 11] (File endorsement omitted)

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ANSWER TO COMPLAINT—Filed February 15, 1963

The Secretary of State, by his attorneys, in answer to the complaint herein filed, says:

First Defense

1. Answering Paragraph 1 of the complaint, the defendant admits that the Court has jurisdiction of this action.

.2-4. The defendant admits the allegations contained in Paragraphs 2 through 4, inclusive, of the complaint.

5. Answering Paragraph 5 of the complaint, the defendant denies that the decision of the Director of the Passport Office of the Department of State on October 26, 1962, was that the revocation of plaintiff's passport was "required" under Section 6 of the Subversive Activities Control Act of 1950. In this connection, the defendant alleges that plaintiff was advised that the passport revocation action was taken by the Director of the Passport Office of the Department of [fol. 12] State on the ground that use by plaintiff of the United States passport would be in violation of Section 6 of the Act. The defendant admits the other allegations contained in Paragraph 5 of the complaint.

6. The defendant admits the allegations contained in Paragraph 6 of the complaint.

7. Answering Paragraph 7 of the complaint, the defendant denies that the action confirming the revocation of plaintiff's passport was "under" section 6 of the Subversive Activities Control Act of 1950 and alleges that such action was based on the finding that use of a United States passport by plaintiff would violate that section. The defendant admits the other allegations contained in Paragraph 7 of the complaint.

8. The defendant denies, on information and belief, the allegations contained in Paragraph 8 of the complaint and, in that connection, alleges that each and every allegation contained in said paragraph is irrelevant and immaterial to the subject matter of this action.

9. Answering Paragraph 9 of the complaint, the defendant admits that because of the action of the defendant in revoking his passport, plaintiff is prohibited from traveling to countries outside the United States for which a valid United States passport is required. The defendant also admits that absent a change in the facts which now sustain the finding made by the defendant with respect to [fol. 13] the revocation of plaintiff's passport, it would be futile for plaintiff to apply to the defendant for a new

passport or for an extension or renewal of the passport which he has revoked. The defendant denies the remaining allegations contained in Paragraph 9 of the complaint.

10. The defendant denies the allegations contained in Paragraph 10 of the complaint.

11. Answering Paragraph 11 of the complaint, the defendant admits that absent a change in the facts which caused him to take the action complained of, he will continue and keep in effect his revocation of plaintiff's passport and will refuse to issue or renew any passport to plaintiff. The defendant denies the other allegations contained in Paragraph 11 of the complaint.

12. The defendant admits the allegations contained in Paragraph 12 of the complaint.

13. The defendant denies the allegations contained in Paragraph 13 of the complaint.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

[fol. 14] Wherefore, defendant, having fully answered the allegations contained in the numbered paragraphs of the complaint, prays that the complaint herein be dismissed, with costs taxed against the plaintiff.

J. Walter Yeagley, Assistant Attorney General; Oran H. Waterman, Attorney, Department of Justice; Benjamin C. Flannagan, Attorney, Department of Justice, Washington 25, D. C., Attorneys for Defendant.

[fol. 15] Certificate of Service (omitted in printing).

[fol. 17]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—

Filed April 17, 1963

The plaintiff, by his attorneys, moves for summary judgment in his favor, for the reason that there is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law. In support of this motion, plaintiff refers to the attached affidavits of himself and Joseph Forer.

John J. Abt, Joseph Forer, Attorneys for Plaintiff.

Certificate of service (omitted in printing).

[fol. 18]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

**AFFIDAVIT OF HERBERT APTHEKER IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT—** Filed April 17, 1963

State of New York,
County of New York, ss.:

Herbert Aptheker, being duly sworn, deposes and says as follows:

1. I am the plaintiff in the above-entitled action and make this affidavit in support of plaintiff's motion for summary judgment.

2. I was born in and I am a citizen of the United States, residing in New York City, New York. On January 1,

1962, I was the holder of the passport referred to in the complaint.

3. My principal occupations since 1938, except for the wartime period, have been and now are as an author, lecturer and editor. From 1942 to 1946, I served in the field artillery in this country and in combat in the European theatre, rising from the rank of private to major. In 1943, I received a Ph.D. in history from Columbia University.

4. I am the author of the following published books: American Negro Slave Revolts, Essays in the History of the American Negro, The Negro People in America, To Be Free: Studies in American Negro History, A Documentary History of the Negro People in the U.S., History and [Vol. 19] Reality, Toward Negro Freedom, The Truth About Hungary, The Colonial Era, The American Revolution: 1763-1783, The World of C. Wright Mills, Dare We Be Free, And Why Not Everyman, and American Foreign Policy and the Cold War. My writings are cited in the bibliographical references of scores of works, including such works as The Columbia Encyclopedia and in bibliographies published by libraries and other official bodies including the U.S. Civil Rights Commission. I have edited or contributed to several other books, including the official History of the Army Ground Forces in World War II. I am also the author of some thirty pamphlets and have contributed numerous articles and reviews to scholarly journals in the fields of history, political science and sociology, and to other periodicals. My writings are in the fields of history—primarily American—and contemporary problems. I am presently at work on a many-volumed History of the American People of which the first two volumes, mentioned above, have been published. I have lectured at many universities and colleges, including Amherst, Howard, Bennett, North Carolina College for Negroes, the University of Iowa, the University of California (at Berkeley), the University of Washington, Wesleyan University, Yale University and Portland State University, at the invitation of the insti-

tution or one of its faculty departments or of an individual professor. I also lecture frequently and regularly before public bodies, student groups, historical association meetings, unions, church groups, forums and other gatherings, and on radio programs.

5. In 1959 and 1960, in the course of travel in Europe, I lectured before the Historical Academy of the Hungarian Academy of Sciences and the Academy of Sciences of Poland and also at Charles University, Prague, the University of Leipzig, the University of Warsaw, the University of Berlin and Humboldt University, Berlin. In 1961, I delivered papers before the Japanese Historical Association in Tokyo and at the University of Tokyo. My [fol. 20] travels in Europe and Asia in 1959-1961 were of inestimable importance to me as a scholar, writer, lecturer and commentator because they enabled me to learn of the work being carried on there by historians and gave me invaluable first-hand impressions of the life and developments in the countries I visited. My experiences, observations and impressions from these travels were reflected in both my writings and lectures in this country.

6. In 1962, revocation of my passport prevented me from accepting invitations to attend a world gathering of historians at Dresden, Germany, and to deliver a series of lectures on the American Civil War at Humboldt University. For the same reason, I could not as planned attend an assemblage of scholars in Accra, Ghana, for a discussion of the projected Encyclopedia Africana. Moreover, the denial of my right to travel abroad has placed serious limitations on all my professional activities, my ability to pursue scholarly research, my opportunity to exchange opinions with fellow scholars in my fields of specialization, and the possibility of gathering material abroad for writing and lecturing. Among other things, the denial of access to overseas archives and depositories—particularly in England and France—places formidable obstacles in the way of the continuation of my work on The History of the American People.

7. I desire to and, if permitted, will travel to Europe and elsewhere to pursue my historical studies, attend

meetings of learned societies and scholars, exchange opinions with fellow historians, lecture at foreign universities, and observe conditions and gather material for my writing and lecturing in this country.

Herbert Aptheker

Subscribed and sworn to before me this 16 day of April, 1963.

Carl Brodsky

[fol. 21]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AFFIDAVIT OF JOSEPH FORER IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT—Filed April 17, 1963

District of Columbia, ss.:

Joseph Forer, being duly sworn, deposes and says:

1. I am one of the plaintiff's attorneys in the above-captioned case. I represented plaintiff in the administrative proceedings in the Department of State which reviewed the revocation of plaintiff's passport, referred to in paragraphs 5, 6 and 7 of the complaint.
2. Attached hereto, marked Exhibit A, is a true copy of the letter of January 22, 1962, from the Acting Director of the Passport Office, referred to in paragraph 4 of the complaint.
3. Attached hereto, marked Exhibit B, is a true copy of the decision, dated October 26, 1962, of the Director of the Passport Office, referred to in paragraph 5 of the complaint.

4. Attached hereto, marked Exhibit C, is a true copy of the letter from the Department of State, dated November 26, 1962, referred to in paragraph 7 of the complaint.

Joseph Forer

Subscribed and sworn to before me this 15th day of April, 1963.

Mary E. Rosenthal, Notary Public

My Commission Expires August 31, 1964

[fol. 22]

[File endorsement omitted]

EXHIBIT A TO AFFIDAVIT

**DEPARTMENT OF STATE
WASHINGTON**

ADDRESS OFFICIAL COMMUNICATIONS TO
THE SECRETARY OF STATE
WASHINGTON 25, D. C.

[EMBLEM]

In reply refer to

PT/LS

REGISTERED MAIL

RETURN RECEIPT REQUESTED

Jan. 22, 1962

Dear Mr. Aptheker:

By direction of the Secretary of State you are hereby informed that your United States Passport No. 1273187 issued on December 10, 1958 and renewed on March 21, 1961 has been revoked. This action is taken because the Department believes that use by you of a United States Passport would be in violation of Section 6 of the Subversive Activities Control Act, 50 U.S.C. Sec. 785.

You are requested to surrender your passport at your earliest convenience and in any event no later than 30 days

from the date of this letter by delivering it to the Passport Agency nearest you or by sending it certified mail to the Passport Office, Department of State, Washington, D. C.

In the event you wish to secure a review of the decision revoking your passport, you are hereby advised of your rights in accordance with the Regulations of the Department of State 22 C.F.R. 51.135-170. A copy of these regulations is enclosed.

Sincerely,

/s/ EDWARD J. HICKEY

Edward J. Hickey

Acting Director, Passport Office

Enclosure:

**Supplement to Passport
Regulations**

Mr. Herbert Aptheker,
32 Ludlam Place,
Brooklyn 25, New York.

[fol. 23]

[File endorsement omitted]

EXHIBIT B TO AFFIDAVIT

**DEPARTMENT OF STATE
WASHINGTON**

ADDRESS OFFICIAL COMMUNICATIONS TO
THE SECRETARY OF STATE
WASHINGTON 25, D. C.

[EMBLEM]

In reply refer to
PT/LS 130-Aptheker, Herbert Eugene

Oct. 26, 1962

Dear Dr. Aptheker:

In a letter dated January 22, 1962, the Acting Director, Passport Office, informed you that your passport had been revoked on the ground that use by you of a United States

Dr. Herbert Aptheker,
32 Ludlam Place,
Brooklyn 25, N. Y.

passport would be in violation of Section 6 of the Subversive Activities Control Act, 50 United States Code, Section 785. You were also advised of your right to seek review of this action in accordance with the provisions of Sections 51.135 through 51.170 of the Passport Regulations, Title 22, Code of Federal Regulations.

A hearing was held in the Passport Office on June 26, 1962. While you did not attend the hearing, you were represented by your attorney, Mr. Joseph Forer, and you were also afforded the opportunity to present evidence.

On October 15, 1962, the Hearing Officer submitted his recommended decision to the Director, Passport Office. At the same time a copy of this decision was sent to your attorney. The Hearing Officer concluded that on the basis of the evidence of record the Department of State had reason to believe that you were within the purview of Section 6 (a) (2) of the Subversive Activities Control Act of 1950, as amended (50 U.S.C. 785), and as a result thereof your use of a passport would be in violation of the law. He, therefore, recommended that the revocation of your passport be made final.

I have studied the record of the hearing of June 26, 1962, as well as the recommended decision of the Hearing Officer. I have reached the conclusion that the evidence establishes that at all times material to this proceeding you were a member of the Communist Party of the United States of [fol. 24] America, and that the revocation of your passport is justified under applicable statutes and regulations. I, therefore, affirm the action taken on January 22, 1962, revoking your passport.

In the light of the foregoing, you are again requested to surrender Passport No. 1273187 issued to you on December 10, 1958, and renewed on March 21, 1961, by delivering it to the nearest Passport Agency or by sending it to the Passport Office, Department of State, Washington 25, D. C.

In accordance with the provisions of Section 51.139 of the Passport Regulations you are entitled to appeal this decision to the Board of Passport Appeals. A reprint from the

Federal Register of January 12, 1962, setting forth the pertinent provisions of the Passport Regulations is enclosed for your information. The Board is located in Room 6224, State Department Building, Washington 25, D. C.

A copy of this letter is being sent to Mr. Forer.

Sincerely,

/s/ K

Frances G. Knight
Director, Passport Office

Enclosure:

Extract Passport Regulations.

cc: Mr. Joseph Forer.

[fol. 25] [File endorsement omitted]

EXHIBIT C TO AFFIDAVIT

Nov. 26, 1962

Dear Dr. Aptheker:

By letter of January 22, 1962, the Acting Director, Passport Office, informed you that United States Passport No. 1273187 issued on December 10, 1958 and renewed on March 21, 1961 had been revoked. You were advised that the action was taken on the grounds that use by you of a United States passport would be in violation of Section 6 of the Subversive Activities Control Act, 50 U.S.C. Sec. 785.

By letter from your attorney dated February 19, 1962, you requested a review of the revocation of your passport. Accordingly, a hearing was held on June 26, 1962 in accordance with the applicable regulations of the Department. The Hearing Officer, in a decision dated October 15, 1962 concluded, on the basis of the evidence adduced at the hearing, that "the Department of State had reason to believe that Dr. Herbert Eugene Aptheker is within the purview of Sec. 6(a)(2) of the Subversive Activities Control Act, and as a result thereof his use of a passport would be in violation of the law." On the basis of this conclusion, the Hearing Officer recommended that the decision to revoke your passport be confirmed.

On October 26, 1962, you were informed by letter from Miss Frances G. Knight, Director, Passport Office, that the decision to revoke your passport had been confirmed, on the basis of the conclusion reached by the Hearing Office, and on the basis of a review of the hearing. You were also advised of your right to appeal the decision to the Board of Passport Appeals, in accordance with the regulations of the Department. By letter of October 29, 1962 from your attorney, you requested a hearing before the Board of Passport Appeals, and a hearing was held before the Board on November 13, 1962. The Board, after full examination of the record and after hearing arguments of counsel, found that "there is a preponderance of evidence in the record to show that at all material times Herbert Eugene Aptheker was a member of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Board." The Board stated

Dr. Herbert Aptheker,
32 Ludlam Place,
Brooklyn 25, New York.

[fol. 25a] that in making this determination it did not take into consideration any confidential security information not part of the record. The Board recommended, on the basis of the evidence on the record, that the decision of the Passport Office to revoke your passport should be affirmed.

The Secretary approved the recommendation of the Board of Passport Appeals on November 23, 1962, and specifically adopted as his own the finding of fact that at all material times you were a member of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act. In so doing, the Secretary has directed me to communicate this information to you, and this letter shall be considered to be the notice of decision in accordance with 22 CFR Sec. 51.167.

You are accordingly advised that the revocation of Passport No. 1273187 issued to you on December 10, 1958 and renewed on March 21, 1961 has been confirmed, and that there is no further procedure in the Department of State for review of this action. You are requested to surrender your passport by delivering it to the Passport Agency nearest you or by sending it to the Passport Office, Department of State, Washington 25, D. C.

Sincerely yours,

William H. Orrick, Jr.
Deputy Under Secretary
for Administration

cc: Mr. Joseph Forer, Esq.

L:AFLowenfeld:epj
11/26/62

[fol. 26] [Filed endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3478-62

ELIZABETH GURLEY FLYNN, 222 West 23rd St.,
New York City, N. Y., Plaintiff,

v.

THE SECRETARY OF STATE, Department of State,
Washington, D. C., Defendant.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF FROM
REVOCATION OF PASSPORT—Filed November 6, 1962

The plaintiff, Elizabeth Gurley Flynn, by her attorneys, complaining of the defendant, The Secretary of State of the United States, alleges:

1. The Court has jurisdiction of this action under sections 11-305 and 11-306 of the District of Columbia Code;

sections 2201, 2282 and 2284 of 28 U.S. Code; and section 10 of the Administrative Procedure Act, 5 U. S. Code section 1009.

2. The plaintiff was born in the United States of America. She is now; and has at all times been since birth, a citizen of the United States of America.

3. On January 21, 1962, the plaintiff was the holder of a United States passport issued by the defendant.

4. On January 22, 1962, the Acting Director of the Passport Office of the Department of State notified the plaintiff that by direction of the defendant the plaintiff's passport was revoked because the Department of State believed that use by plaintiff of a United States passport would be in violation of section 6 of the Subversive Activities Control Act, 50 U. S. Code, section 785.

5. Thereafter, at the request of the plaintiff and pursuant to regulations issued by the defendant, an administrative hearing was held in the Department of State to review the revocation of plaintiff's passport. The hearing culminated in a decision, dated July 17, 1962, by the Director of the Passport Office of the Department of State that the revocation of plaintiff's passport was required under section 6 of the Subversive Activities Control Act.

[fol. 27] 6. Pursuant to regulations of the defendant, the plaintiff appealed the decision of the Director of the Passport Office to the Board of Passport Appeals of the Department of State. Following a hearing before the Board, the Board found that "there is a preponderance of evidence in the record to show that at all material times [the plaintiff] was a member of the Communist Party of the United States with knowledge or notice that such organization has been required to register as a Communist organization under the Subversive Activities Control Act." On the basis of this finding, the Board recommended to the defendant that he affirm the decision of the Passport Office to revoke plaintiff's passport.

7. On or about October 18, 1962, the defendant approved the recommendation of the Board of Passport Appeals,

specifically adopted as his own the above-quoted finding of the Board, and on the basis of that finding confirmed the revocation of plaintiff's passport under section 6 of the Subversive Activities Control Act. Notice of the defendant's decision was given to plaintiff by a letter from the Department of State, dated October 23, 1962.

8. The plaintiff desires to travel to countries of Europe and elsewhere for recreation and study, to observe social, political and economic conditions abroad, and thereafter to write, publish and lecture about her observations.

9. Because of the action of the defendant in revoking her passport, plaintiff is prohibited from traveling abroad as she desires. Moreover, because of the finding made by the defendant as the basis for his action, it would be futile for plaintiff to apply to the defendant for a new passport or for an extension or renewal of the passport which he has revoked. In addition, under sections 6 and 15 of the Subversive Activities Act and in consequence of the defendant's finding with respect to plaintiff, any such application would subject plaintiff to criminal prosecution.

10. The revocation of plaintiff's passport by defendant is unlawful in that section 6 of the Subversive Activities Control Act, upon which such revocation was based, is unconstitutional on its face and as applied to plaintiff, being (a) a deprivation without due process of law of plaintiff's constitutional liberty to travel abroad, in violation of the [fol. 28] Fifth Amendment to the Constitution of the United States, (b) an abridgement of plaintiff's freedoms of speech, press and assembly, in violation of the First Amendment, (c) a penalty imposed on plaintiff without a judicial trial, and therefore a bill of attainder, in violation of Article I, section 9 of the Constitution, (d) a deprivation of plaintiff's right to trial by jury as required by the Fifth and Sixth Amendments and Article III, section 2, clause 3 of the Constitution, and (e) the imposition of a cruel and unusual punishment in violation of the Eighth Amendment.

11. Unless enjoined by the Court, the defendant will continue and keep in effect his revocation of plaintiff's

passport and will refuse to issue or renew any passport to plaintiff.

12. The plaintiff has exhausted her administrative remedies.

13. The plaintiff is suffering irreparable injury from defendant's action, for which she has no adequate remedy at law.

Wherefore, plaintiff prays:

(1) That a three-judge court be convened to determine this controversy pursuant to sections 2282 and 2284 of 28 U. S. Code; (2) That judgment be entered (a) declaring that section 6 of the Subversive Activities Control Act is repugnant to the Constitution of the United States; (b) enjoining and restraining the defendant from enforcing and executing against the plaintiff section 6 of that Act by reason of such repugnance, from continuing in effect his revocation of plaintiff's passport, and from denying to plaintiff the issuance or renewal of a passport; (c) ordering the defendant to reissue to plaintiff a valid United States passport of standard form and duration; and (d) granting such other and further relief as may be just and appropriate.

John J. Abt, 320 Broadway, New York City, N. Y.;

Joseph Forer, 711 14th St. N.W., Washington, D.C.,
Attorneys for Plaintiff.

[fol. 29]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ANSWER TO COMPLAINT—Filed February 4, 1963

The Secretary of State, by his attorneys, in answer to the complaint herein filed, says:

First Defense

1. Answering Paragraph 1 of the complaint, the defendant admits that the Court has jurisdiction of this action.

2-4. The defendant admits the allegations contained in Paragraphs 2 through 4, inclusive, of the complaint.

5. Answering Paragraph 5 of the complaint, the defendant denies that the decision of the Director of the Passport Office of the Department of State on July 17, 1962, was that the revocation of plaintiff's passport was "required" under Section 6 of the Subversive Activities Control Act of 1950. In this connection, the defendant alleges that plaintiff was advised that the passport revocation action was taken by the Director of the Passport Office of the Department of State on the ground that use by plaintiffs of a United States passport would be in violation of [fol. 30] Section 6 of the Act. The defendant admits the other allegations contained in Paragraph 5 of the complaint.

6. The defendant admits the allegations contained in Paragraph 6 of the complaint.

7. Answering Paragraph 7 of the complaint, the defendant denies that the action confirming the revocation of plaintiff's passport was "under" Section 6 of the Subversive Activities Control Act of 1950 and alleges that such action was based on the finding that use of a United States passport by plaintiff would violate that section. The de-

defendant admits the other allegations contained in Paragraph 7 of the complaint.

8. The defendant, on information and belief, denies the allegations contained in Paragraph 8 of the complaint and, in that connection, alleges that each and every allegation contained in said paragraph is irrelevant and immaterial to the subject matter of this action.

9. Answering Paragraph 9 of the complaint, the defendant admits that because of the action of the defendant in revoking her passport, plaintiff is prohibited from traveling to countries outside the United States for which a valid United States passport is required. The defendant also admits that absent a change in the facts which now sustain the finding made by the defendant with respect to the revocation of plaintiff's passport, it would be futile for [fol. 31] plaintiff to apply to the defendant for a new passport or for an extension or renewal of the passport which he has revoked. The defendant denies the remaining allegations contained in Paragraph 9 of the complaint.

10. The defendant denies the allegations contained in Paragraph 10 of the complaint.

11. Answering Paragraph 11 of the complaint, the defendant admits that absent a change in the facts which caused him to take the action complained of, he will continue and keep in effect his revocation of plaintiff's passport and will refuse to issue or renew any passport to plaintiff. The defendant denies the other allegations contained in Paragraph 11 of the complaint.

12. The defendant admits the allegations contained in Paragraph 12 of the complaint.

13. The defendant denies the allegations contained in Paragraph 13 of the complaint.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

[fol. 32] Wherefore, defendant, having fully answered the allegations contained in the numbered paragraphs of the complaint, prays that the complaint herein be dismissed, with costs taxed against the plaintiff.

J. Walter Yeagley, Assistant Attorney General; Oran H. Waterman, Attorney, Department of Justice; Benjamin C. Flannagan, Attorney, Department of Justice, Washington 25, D.C., Attorneys for Defendant.

[fol. 33] Certificate of Service (omitted in printing).

[fol. 34] [File-endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—

Filed April 17, 1963

The plaintiff, by her attorneys, moves for summary judgment in her favor, for the reason that there is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law. In support of this motion, plaintiff refers to the attached affidavits of herself and Joseph Forer.

John J. Abt; Joseph Forer, Attorneys for Plaintiff.

Certificate of Service (omitted in printing).

[fol. 35] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AFFIDAVIT OF ELIZABETH GURLEY FLYNN IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Filed April 17, 1963

State of New York,
County of Bronx, ss.:

Elizabeth Gurley Flynn, being duly sworn, deposes and says as follows:

1. I am the plaintiff in the above-entitled action and make this affidavit in support of plaintiff's motion for summary judgment.
2. I was born in and I am a citizen of the United States, residing in New York City, New York. On January 21, 1962, I was the holder of the United States passport referred to in the complaint.
3. A substantial part of my time is spent in writing and lecturing: For many years, I have written a weekly column for the newspaper, The Worker. I am the author of two books, I Speak My Own Piece, the first volume of a planned two volume autobiography, and the recently published The Alderson Story. I do a great deal of public speaking and lecturing from coast to coast in this country before various audiences, including women's, student and political groups and organizations. I participate in forum [fol. 36] discussions and, in my travels around the country, appear on radio and TV programs.
4. My writing and public speaking is on a variety of subjects, including the labor movement, problems of women and young people, international relations, domestic and foreign political developments, and questions relating to socialism.

5. Since 1945, I have made a number of trips to Europe where I have visited England, France, Denmark and a number of the socialist countries including the Soviet Union. I wrote about my observations and experiences in my Worker column both during my sojourns abroad and after I returned home. I also made use of the material I gathered abroad in several hundred speaking engagements in this country. In the course of my European travels, I spoke before groups of women, students and workers in the various countries that I visited on developments in the United States.

6. It is my desire and intention to travel to Europe again for the purpose of rest and recreation, to gather additional current material for my writing and speaking, and—as in the past—to speak to European audiences about the activities of the American people, particularly in the labor movement and on the question of peace. Also, I am about to start work on the second volume of my autobiography which will cover the period from 1926 to date. In that connection, I find it necessary to revisit Europe for the purpose of refreshing my memory of people and places and to obtain first-hand impressions of current conditions.

[fol. 37] 7. It is my earnest belief that my writing and speaking here and abroad has made a modest but not altogether unimportant contribution to the mutual understanding between peoples—and particularly between the American people and the people of the socialist countries—which alone can provide the basis for friendship and peace.

Elizabeth Gurley Flynn

Subscribed and sworn to before me this 12th day of April, 1963.

Milton Pard

Notary Public, State of New York
No. 03-5177625 Qua. in Bronx County,
Commission Expires March 30, 1964

[fol. 38]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AFFIDAVIT OF JOSEPH FORER IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT—Filed April 17, 1963

District of Columbia, ss:

Joseph Forer, being duly sworn, deposes and says:

1. I am one of the plaintiff's attorneys in the above-captioned case, I represented plaintiff in the administrative proceedings in the Department of State which reviewed the revocation of plaintiff's passport, referred to in paragraphs 5, 6 and 7 of the complaint.
2. Attached hereto, marked Exhibit A, is a true copy of the letter of January 22, 1962, from the Acting Director of the Passport Office, referred to in paragraph 4 of the complaint.
3. Attached hereto, marked Exhibit B, is a true copy of the decision, dated July 17, 1962, of the Director of the Passport Office, referred to in paragraph 5 of the complaint.
4. Attached hereto, marked Exhibit C, is a true copy of the letter from the Department of State, dated October 23, 1962, referred to in paragraph 7 of the complaint.
5. Attached hereto, marked Exhibit D, is a true copy of a letter dated October 29, 1962, received by me from the Counsel of the Board of Passport Appeals, correcting a typographical omission from the letter referred to in paragraph 4 hereof.

Joseph Forer

Subscribed and sworn to before me this 15th day of April, 1963.

Mary E. Rosenthal, Notary Public. My Commission
Expires August 31, 1964.

[fol. 39]

[File endorsement omitted]

EXHIBIT A TO AFFIDAVIT

DEPARTMENT OF STATE
WASHINGTONADDRESS OFFICIAL COMMUNICATIONS TO
THE SECRETARY OF STATE
WASHINGTON, 25, D.C.

[Emblem]

In reply refer to
PT/LSREGISTERED MAIL
RETURN RECEIPT REQUESTED

JAN 22 1962

Dear Mrs. Flynn:

By direction of the Secretary of State you are hereby informed that your United States Passport No. 2016926 issued on March 10, 1960 has been revoked. This action is taken because the Department believes that use by you of a United States Passport would be in violation of Section 6 of the Subversive Activities Control Act, 50 U.S.C. Sec. 785.

You are requested to surrender your passport at your earliest convenience and in any event no later than 30 days from the date of this letter by delivering it to the Passport Agency nearest you or by sending it certified mail to the Passport Office, Department of State, Washington, D.C.

In the event you wish to secure a review of the decision revoking your passport, you are hereby advised of your rights in accordance with the Regulations of the Department of State 22 C.F.R. 31.135-170. A copy of these regulations is enclosed.

Sincerely,

/s/ EDWARD J. HICKEY

Edward J. Hickey

Acting Director, Passport Office

Enclosure:

Supplement to Passport
RegulationsMrs. Elizabeth G. Flynn,
224 East 12th Street,
New York 3, New York.

[fol. 40]

[File endorsement omitted]

Copy for Mr. Joseph Forer

EXHIBIT B TO AFFIDAVIT

DEPARTMENT OF STATE
WASHINGTONADDRESS OFFICIAL COMMUNICATIONS TO
THE SECRETARY OF STATE
WASHINGTON, D. C.

(Emblem)

In reply refer to
PT/LS 130—Flynn, Elizabeth Gurley

Jul 17 1962

Dear Mrs. Flynn:

By letter of January 22, 1962, the Acting Director, Passport Office, informed you that United States Passport No. 2016926, which was issued to you on March 10, 1960, had been revoked. You were advised of your right to seek review of this action in accordance with the Regulations of the Department of State, Title 22 Code of Federal Regulations 51.135 through 51.170.

By letter of February 16, 1962, your attorney, Mr. Joseph Forer, applied for a review of the revocation of your passport. A hearing was held in the Department of State on April 24 and May 3, 1962. The hearing was presided over by Mr. Max L. Kane, Hearing Officer, and a transcript was made of the proceedings. Both you and the Passport Office were represented by counsel and were accorded opportunity to present evidence. All witnesses were subjected to cross-examination and testimony was under oath. The Hearing Officer, upon completion of the hearing, submitted his recommended decision, a copy of which was furnished your attorney. He concluded that the evidence adduced at the hearing clearly established that, at all the material times you were an active, participating, and continuous member of the Communist Party of the United States of America; that by such membership you had forfeited your right to use a United States Passport under the applicable law; and that the administrative

action revoking your passport was clearly sustained by the record.

I have studied the transcript of the hearing of April 24 and May 3, 1962, including the evidence entered into the record thereof as well as the recommended decision of the Hearing Officer. I have reached the conclusion that the action to revoke your passport was in accordance with law, and that no change, correction, or modification is warranted. In arriving at this decision I have considered only the testimony and evidence presented at the hearing.

Mrs. Elizabeth Gurley Flynn,
224 East 12th Street,
New York 3, New York.

[fol. 41] In view of the foregoing, you are hereby advised and informed that the United States Passport No. 2016926, issued to you on March 10, 1960, has been revoked. You are requested to surrender said passport immediately by delivering it to the Passport Agency nearest you or by sending it to the Passport Office, Department of State, Washington 25, D. C. You are further advised that you are entitled to appeal this decision in accordance with the provisions of Title 22 Code of Federal Regulations 51.139 which reads as follows:

"In the event of a decision adverse to the applicant, he shall be entitled within thirty days after receipt of notice of such decision to appeal his case to the Board of Passport Appeals provided for in 51.150."

Any appeal must be in writing and may be delivered personally, by registered mail, or by leaving a copy at the office of the Board of Passport Appeals, Room 6224, State Department Building, Washington, D. C.

By copy of this letter your attorney is advised of this decision.

Sincerely,

/s/ FGK
Frances G. Knight
Director, Passport Office

[fol. 42]

[File endorsement omitted]

EXHIBIT C TO AFFIDAWT**DEPARTMENT OF STATE
WASHINGTON****ADDRESS OFFICIAL COMMUNICATIONS TO
THE SECRETARY OF STATE
WASHINGTON 25; D. C.**

[Emblem]

Oct 23 1962

Dear Mrs. Flynn:

By letter of January 22, 1962, the Acting Director, Passport Office, informed you that United States Passport No. 2016926 which was issued to you on March 10, 1960 has been revoked. You were advised that the action was taken on the grounds that use by you of a United States passport would be in violation of Section 6 of the Subversive Activities Control Act, 50 U.S.C., Sec. 785.

By letter from your attorney dated February 16, 1962, you requested a review of the revocation of your passport, and a hearing was held on April 24 and May 3, 1962 in accordance with the applicable regulations of the Department. The Hearing Officer in a decision dated June 18, 1962 concluded that "the evidence adduced at the hearing clearly establishes that at all the times material in this proceeding, petitioner was an active, participating and continuous member of the Communist Party of the United States." On the basis of this conclusion, the Hearing Officer recommended that the decision to revoke your passport be confirmed.

On July 17, 1962, you were informed by letter from Miss Frances G. Knight, Director, Passport Office, that the decision to revoke your passport had been confirmed, on the basis on the conclusion reached by the Hearing Officer, and on the basis of a review of the record of the hearing. The Board, after full examination of the record and after hearing arguments of counsel, found that "there is a preponderance of evidence in the record to show that at all mate-

rial times Mrs. Flynn was a member of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act." The Board stated that in making this determination it did not take into consideration any confidential security information not part of the record. The Board recommended, on the basis of the evidence on the record, that the decision of the Passport Office to revoke your passport should be affirmed.

Mrs. Elizabeth Gurley Flynn,
224 East 12th Street,
New York 3, New York.

[fol. 43] The Secretary approved the recommendation of the Board of Passport Appeals on October 18, 1962, and specifically adopted as his own the finding of fact that "at all material times you were a member of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act." In so doing, the Secretary relied solely on the evidence in the record. The Secretary has directed me to communicate this information to you and this letter shall be considered to be the notice of decision in accordance with 22 CFR Sec. 51.167.

You are accordingly advised that the revocation of Passport No. 2016926 issued to you on March 10, 1960 has been confirmed, and that there is no further procedure in the Department of State for review of this action. You are requested to surrender your passport by delivering it to the Passport Agency nearest you or by sending it to the Passport Office, Department of State, Washington 25, D.C.

Sincerely yours,

/s/ WILLIAM H. ORRICK, JR.
William H. Orrick, Jr.
Deputy Under Secretary
for Administration

cc: Mr. Joseph Forer, Esq.,

[fol. 44]

[File endorsement omitted]

EXHIBIT D TO AFFIDAVIT

DEPARTMENT OF STATE
WASHINGTONADDRESS OFFICIAL COMMUNICATIONS TO
THE SECRETARY OF STATE
WASHINGTON 25, D. C.

[Emblem]

October 29, 1962,

Dear Mr. Forer:

I have just seen the letter of October 23, 1962 from the Deputy Under Secretary for Administration to Mrs. Elizabeth Gurley Flynn concerning the revocation of Mrs. Flynn's passport. You will understand, of course, that "the Board" referred to in the third paragraph of the Under Secretary's letter is the Board of Passport Appeals. A sentence apparently was inadvertently omitted from that paragraph stating the fact that you had appealed the decision of the Passport Office to the Board of Passport Appeals and that the Board had held a hearing on October 11, 1962.

In view of that omission I thought it desirable to send you this brief note for the record.

Sincerely yours,

/s/ CARL F. SALANS

Carl F. Salans

Counsel

Board of Passport Appeals

Joseph Forer, Esquire,
711—14th Street, N. W.,
Washington 5, D. C.

[fol. 45] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA.

[Titles omitted]

ORDER OF CONSOLIDATION—Filed April 29, 1963

On consent of the parties, and it appearing that these actions involve common questions of law, it is by the Court, this 29th day of April, 1963,

Ordered, That the above-captioned actions be, and they hereby are, consolidated pursuant to Rule 42(a), Federal Rules of Civil Procedure.

Joseph C. McGarragh, Judge.

Consented to:

Joseph Forer, Attorney for Plaintiffs.

Benjamin C. Flannagan, Attorney, Department of Justice, Attorney for Defendant.

[fol. 46] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Titles omitted]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—
Filed May 28, 1963

Now comes the defendant, the Secretary of State, by his attorneys, and respectfully moves this Honorable Court for summary judgment under Rule 56 of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law.

In support of this motion the Court's attention is respectfully invited to the affidavit of Frances G. Knight and to the defendant's memorandum of points and authorities in [fol. 47] support on his motion for summary judgment and in opposition to plaintiffs' motions for summary judgment, both attached hereto.

A separate Statement of Material Facts is also filed here-with.

J. Walter Yeagley, Assistant Attorney General, Oran H. Waterman, Attorney, Department of Justice, Benjamin C. Flannagan, Attorney, Department of Justice, Washington 25, D. C., Attorneys for Defendant.

[fol. 48]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[Titles omitted]

STATEMENT OF MATERIAL FACTS—Filed May 28, 1963

Introduction

The plaintiff Elizabeth Gurley Flynn is publicly well-known to be the current National Chairman of the Communist Party of the United States of America. See Exhibit 103 to Knight Affidavit. The plaintiff Herbert Eugene Aptheker is equally publicly well-known to be the present Editor of *Political Affairs*, the self-described "theoretical organ of the Communist Party" of the United States of America. Exhibit 202 to Knight Affidavit, pages A-54-A-57. Both plaintiffs testified as witnesses for the Communist Party, U.S.A. in the registration proceeding before the Subversive Activities Control Board styled *Attorney General v. Communist Party, U.S.A.*, Docket No. 51-101, which registration order was affirmed by the Supreme Court in *Communist Party v. Control Board*, 367 U.S. 1 (1961). Exhibit 101 to Knight Affidavit, pages A-17-A-20; Exhibit 202 to Knight Affidavit, page A-34. Plaintiffs' long history of

[fol. 49] activity in the Communist Party, U.S.A. was thoroughly established at their hearings. Exhibits 101 and 202 to Knight Affidavit. With respect to the plaintiff Flynn the hearing officer stated, Exhibit 103 to Knight Affidavit:

"The evidence adduced at the hearing clearly establishes that at all times material in this proceeding, petitioner [Flynn] was an active, participating and continuous member of the Communist Party of the United States; was active in the Party's affairs and its organization; and indeed was and still is one of its principal officials."

With respect to the plaintiff Aptheker the hearing officer stated, Exhibit 203 to Knight Affidavit:

"An examination of the documentary evidence submitted by the Department of State, which evidence was used to reach a decision that Petitioner's [Aptheker's] passport should be revoked, is more than sufficient to reach this determination. In fact, the Petitioner [Aptheker] makes it quite clear in his own words that he has been a member of the Communist Party since 1939 and that he is very proud of this association and will do whatever he can to further the aims and goals of the Party."

Mrs. Elizabeth Gurley Flynn

1. On December 30, 1959 Mrs. Flynn applied for a passport. A copy of her application is attached as Exhibit 100 to the Knight Affidavit.
2. On March 10, 1960 Mrs. Flynn was issued a United States Passport. Knight Affidavit, Paragraph 3.
3. On January 22, 1962 the Acting Director of the Passport Office of the Department of State notified Mrs. Flynn that by direction of the Secretary of State her passport was revoked because the Department of State believed that use by Mrs. Flynn of a United States Passport would be in violation of Section 6 of the Internal Security Act of 1950, 50 U.S.C. 785. Complaint; Paragraph 4; Exhibit A to Forer Affidavit.

[fol. 50] 4. Thereafter at the request of Mrs. Flynn and pursuant to Section 51.135 et seq. of the Passport Regulations, 22 C.F.R., on April 24 and May 3, 1962, Mrs. Flynn was accorded an administrative hearing to review the revocation of her passport. Complaint, Paragraph 5; Transcript of Proceedings attached as Exhibits 101 and 102 to the Knight Affidavit.

5. The hearing examiner, Mr. Max L. Kane, on June 18, 1962 recommended that the Director of the Passport Office sustain the revocation of Mrs. Flynn's passport. Exhibit 103 to the Knight Affidavit.

6. On July 17, 1962 the Director of the Passport Office concluded that the action revoking Mrs. Flynn's passport was in accordance with law and notified Mrs. Flynn of her appeal rights. Exhibit B to Forer Affidavit.

7. Thereafter on October 11, 1962 Mrs. Flynn was accorded a hearing before the Board of Passport Appeals. Complaint, Paragraph 6; Transcript of Proceedings attached as Exhibit 104 to Knight Affidavit.

8. The Board of Passport Appeals found that "there is a preponderance of evidence in the record to show that at all material times Mrs. Flynn was a member of the Communist Party of the United States with knowledge or notice that such organization has been required to register as a Communist organization under the Subversive Activities Control Act [of 1950, 50 U.S.C. 781 et seq.]". Complaint, Paragraph 6.

9. On October 18, the Secretary of State approved the recommendation of the Board of Passport Appeals, specifically adopting as his own the above-quoted finding of [fol. 51] the Board, and on the basis of that finding confirmed the revocation of Mrs. Flynn's passport on the ground that use of a United States Passport by Mrs. Flynn would violate Section 6 of the 1950 Act. Complaint and Answer, Paragraph 7.

10. Notice of the decision of the Secretary of State was given to Mrs. Flynn by a letter from the Department of

State dated October 23, 1962. Complaint, Paragraph 7; Exhibit C to Forer Affidavit.

11. Mrs. Flynn filed this civil action on November 6, 1962.

12. Mrs. Flynn's passport expired on March 9, 1963. Knight Affidavit, Paragraph 13.

13. Mrs. Flynn has not applied for the two-year renewal of her passport. Knight Affidavit, Paragraph 14.

Herbert Eugene Aptheker

1. On December 3, 1958, Aptheker applied for a passport. A copy of his application is attached as Exhibit 200 to the Knight Affidavit.

2. On December 10, 1958 Aptheker was issued a passport. Knight Affidavit, Paragraph 17.

3. On December 9, 1960 Aptheker's passport expired. Knight Affidavit, Paragraph 18.

4. On March 3, 1961 Aptheker applied for the renewal of his passport. A copy of his renewal application is attached as Exhibit 201 to the Knight Affidavit.

5. On March 21, 1961, Aptheker's passport was renewed. Knight Affidavit, Paragraph 20.

[fol. 52] 6. On January 22, 1962 the Acting Director of the Passport Office of the Department of State notified Aptheker that by direction of the Secretary of State his passport was revoked because the Department of State believed that use by him of a United States Passport would be in violation of Section 6 of the Internal Security Act of 1950, 50 U.S.C. 785. Complaint, Paragraph 4; Exhibit A to Forer Affidavit.

7. Thereafter at Aptheker's request and pursuant to Section 51.135 et seq. of the Passport Regulations, 22 C.F.R., on June 26, 1962, Aptheker was accorded an administra-

tive hearing to review the revocation of his passport. Complaint, Paragraph 5; Transcript of Proceedings attached as Exhibit 202 to Knight Affidavit.

8. The hearing examiner, Mr. Raymond J. Lynch, on October 15, 1962 recommended that the Director of the Passport Office sustain the revocation of Aptheker's passport. Exhibit 203 to Knight Affidavit.

9. On October 26, 1962 the Director of the Passport Office concluded that the action revoking Aptheker's passport was in accordance with law and notified Aptheker of his appeal rights. Exhibit B to Forer Affidavit.

10. Thereafter on November 13, 1962 Aptheker was accorded a hearing before the Board of Passport Appeals. Complaint, Paragraph 6; Transcript of Proceedings attached as Exhibit 204 to Knight Affidavit.

11. The Board of Passport Appeals found that "there is a preponderance of evidence in the record to show that at all material times [Aptheker] was a member of the Communist Party of the United States with knowledge or notice that such organization has been required to register as a Communist organization under the Subversive Activities Control Act [of 1950, 50 U.S.C. 781 *et seq.*]." Complaint, Paragraph 6.

[fol. 53] 12. On November 23, 1962 the Secretary of State approved the recommendation of the Board of Passport Appeals, specifically adopting as his own the above-quoted finding of the Board, and on the basis of that finding confirmed the revocation of Aptheker's passport on the ground that use of a United States Passport by Aptheker would violate Section 6 of the 1950 Act. Complaint and Answer, Paragraph 7.

13. Notice of the decision of the Secretary of State was given to Aptheker by a letter from the Department of State dated November 26, 1962. Complaint, Paragraph 7; Exhibit C to Forer Affidavit.

14. Aptheker's passport expired on December 9, 1962 and is not subject to renewal. Knight Affidavit, Paragraphs 17, 20 and 29.

15. Aptheker has not applied for a new passport, Knight Affidavit, Paragraph 30.

16. Aptheker filed this civil action on December 14, 1962.

J. Walter Yeagley, Assistant Attorney General;

Oran H. Waterman, Attorney, Department of Justice;

Benjamin C. Flannagan, Attorney, Department of Justice, Washington 25, D. C.; Attorneys for the Defendant.

[fol. 54]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AFFIDAVIT OF FRANCES G. KNIGHT—Filed May 28, 1963

City of Washington,
District of Columbia, ss.

Frances G. Knight, being duly sworn, deposes and says:

1. That on May 1, 1955, she was duly appointed as the Director of the Passport Office of the Department of State, that she has continued to serve as the Director since that time, and that she has personal knowledge of the matters related in this affidavit.

2. That on December 30, 1959, Mrs. Elizabeth Gurley Flynn applied for a passport. A copy of her application is attached hereto as Exhibit 100;

3. That on March 10, 1960, Mrs. Flynn was issued a United States passport valid for a period of three years and susceptible of renewal for an additional two year period (22 USC 217a, as amended by Public Law 86-267) (78 Stat. 552);

[fol. 55] 4. That on January 22, 1962, the Acting Director of the Passport Office of the Department of State notified Mrs. Flynn that by direction of the Secretary of State her passport had been revoked because the Department of State believed that use by her of a United States Passport would be in violation of Section 6 of the Internal Security Act of 1950, 50 U.S.C. 785;

5: That thereafter on April 24 and May 3, 1962, at the request of Mrs. Flynn and pursuant to Section 51.135 *et seq.* of Title 22 of the Code of Federal Regulations, Mrs. Flynn was accorded an administrative hearing to review the revocation of her passport. The Transcripts of Proceedings are attached hereto as Exhibits 101 and 102;

6. That on June 18, 1962, the hearing examiner, Mr. Max L. Kane, submitted findings which sustained the action of the Director of the Passport Office in revoking Mrs. Flynn's passport. His report is attached hereto as Exhibit 103;

7. That on July 17, 1962, the Director of the Passport Office, having studied the transcripts of the hearing of April 24 and May 5, 1962, and the hearing examiner's report, concluded that the action revoking Mrs. Flynn's passport was in accordance with law and notified Mrs. Flynn of her appeal rights;

8. That thereafter on October 11, 1962, Mrs. Flynn was accorded a hearing before the Board of Passport Appeals. The Transcript of Proceedings is attached hereto as Exhibit 104;

9. That the Board of Passport Appeals found that "there is a preponderance of evidence in the record to show that at all material times [Mrs. Flynn] was a member of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act [of 1950, 50 U.S.C. 781 *et seq.*]";

[fol. 56] 10. That on October 18, 1962, the Secretary of State approved the recommendation of the Board of Pass-

port Appeals, specifically adopting as his own the above-quoted finding of the Board, and on the basis of that finding reaffirmed the revocation of Mrs. Flynn's passport on the ground that her use of a United States passport would violate Section 6 of the 1950 Act;

11. That notice of the decision of the Secretary of State was given to Mrs. Flynn by a letter from the Department of State dated October 23, 1962;

12. That Mrs. Flynn filed this civil action on November 6, 1962;

13. That Mrs. Flynn's passport expired on March 9, 1963;

14-15. That Mrs. Flynn has not applied for renewal of her passport;

16. That on December 9, 1958, Herbert Eugene Aptheker applied for a passport. A copy of his application is attached hereto as Exhibit 200;

17. That on December 10, 1958, Aptheker was issued a United States passport valid for a period of two years and susceptible of renewal for an additional two year period (22 U.S.C. 217a, 44 Stat. 887);

18. That on December 9, 1960, Aptheker's passport expired;

19. That on March 3, 1961, Aptheker applied for the renewal of his passport. A copy of his renewal application is attached hereto as Exhibit 201;

20. That on March 21, 1961, Aptheker's passport was renewed to expire on December 9, 1962;

[fol. 57] 21. That on January 22, 1962, the Acting Director of the Passport Office of the Department of State notified Aptheker that by the direction of the Secretary of State his passport had been revoked because the Department of State believed that use by him of a United States passport would be in violation of Section 6 of the Internal Security Act of 1950, 50 U.S.C. 785;

22. That thereafter on June 26, 1962, at Aptheker's request and pursuant to Section 51.135 *et seq.* of Title 22 of the Code of Federal Regulations Aptheker was accorded an administrative hearing to review the revocation of his passport. The Transcript of Proceedings is attached hereto as Exhibit 202;

23. That the hearing examiner, Mr. Raymond J. Lynch, issued his findings on October 15, 1962, recommending that the Director of the Passport Office make final the revocation of Aptheker's passport. This decision is attached hereto as Exhibit 203;

24. That on October 26, 1962, the Director of the Passport Office, having reviewed the transcript of the hearing and the hearing examiner's recommendation, concluded that the action revoking Aptheker's passport was in accordance with law and notified Aptheker of his appeal rights;

25. That thereafter on November 13, 1962, Aptheker was accorded a hearing before the Board of Passport Appeals. The Transcript of Proceedings is attached hereto as Exhibit 204;

26. That the Board of Passport Appeals found that "there is a preponderance of evidence in the record to show that at all material times [Aptheker] was a member of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act [of 1950, 50 U.S.C. 781 *et seq.*]";

{fol. 58] 27. That on November 23, 1962, the Secretary of State approved the recommendation of the Board of Passport Appeals, specifically adopting as his own the above-quoted finding of the Board, and on the basis of that finding reaffirmed the revocation of Aptheker's passport on the ground that his use of a United States passport would violate Section 6 of the 1950 Act;

28. That notice of the decision of the Secretary of State was given to Aptheker by a letter from the Department of State dated November 26, 1962;

29. That Aptheker's passport expired on December 9, 1962, and is not further renewable;
30. That Aptheker has not applied for a new passport; and
31. That Aptheker filed this civil action on December 14, 1962.

Frances G. Knight

Sworn to before me this 24th day of May, 1963.

Helen Dzungan, Notary Public.

My Commission expires 10/31/63.

(Seal)

[fol. 59] Certificate of Service (omitted in printing).

[fol. 60]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3478-62

ELIZABETH GURLEY FLYNN,

v.

DEAN RUSK, Secretary of State.

Civil Action No. 3886-62

HERBERT EUGENE APTHEKER,

v.

DEAN RUSK, Secretary of State

Mr. Joseph Forer of Washington, D. C., and Mr. John J. Abt, of the Bar of the State of New York, *pro hac vice*, by special leave of Court, for plaintiffs.

Mr. Benjamin C. Flannagan, Attorney, Department of Justice, with whom Mr. J. Walter Yeagley, Assistant Attorney General, and Mr. Oran H. Waterman, Attorney, Department of Justice, were on the brief, for defendant.

OPINION—Filed July 12, 1963

Before Burger, Circuit Judge, Hart and Walsh, District Judges.

On April 30, 1963, upon application of each plaintiff and agreement of the Government and after motion to convene a three-judge court was heard and granted, this Court was appointed to hear the question of the constitutional validity of section 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U.S.C. 785, as applied to the facts of the cases at bar.

The plaintiff Elizabeth Gurley Flynn filed suit on November 6, 1962, and the plaintiff Herbert Eugene Aptheker on December 14, 1962. The facts of each case are practically identical, and the cases were consolidated by order of the Court on April 29, 1963.

[fol. 61] Section 6 of the Subversive Activities Control Act, provides, in pertinent part, as follows:

"(a) When a Communist organization as defined in paragraph (5) of section 782 of this title, is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

"(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

"(2) to use or attempt to use any such passport."

For the purposes of the questions here presented, the above section of the Act became effective October 20, 1961, when the Communist Party of the United States was ordered to register by a final order of the Subversive Activities Control Board, pursuant to the authority of section 7

of the Act, 50 U.S.C. 786, said section 7 having been previously upheld by the Supreme Court in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961).

On January 22, 1962, the Acting Director of the Passport Office notified both plaintiffs that their passports were revoked because of the belief by the Department of State that use of their passports would be in violation of the Subversive Activities Control Act. Plaintiffs were also informed of their right to a hearing. Subsequently, both passports expired: Mr. Aptheker's on December 9, 1962, and Mrs. Flynn's on March 9, 1963.

[fol. 62] Administrative hearings were held at the request of the plaintiffs at which plaintiffs were represented by counsel but did not choose to appear personally. The hearing examiner, in each case, found the plaintiffs to be members of the Communist Party and affirmed the ruling of the Passport Office. Both plaintiffs subsequently were accorded hearings before the Board of Passport Appeals and the decisions of the hearing examiners were affirmed. The Secretary of State adopted the findings of the Board as to both plaintiffs and held,

"there is a preponderance of evidence in the record to show that at all material times [each plaintiff] was a member of the Communist Party of the United States with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act."

The matter is now before the Court on cross-motions for summary judgment, both parties stipulating that all administrative remedies have been exhausted. The plaintiffs agree that for the purpose of these proceedings, the Secretary of State had an adequate evidentiary basis for finding that plaintiffs were members of the Communist Party. The plaintiffs further agree that the Secretary of State made findings on all matters required by section 6. The Secretary is not required, under the terms of the statute, to make any findings as to the purpose of the travel for which the passport is requested and he in fact made none.

The validity of section 6 has not been determined by the courts, but such determination was reserved for future consideration [fol. 63] in *Communist Party v. Control Board*, *supra*, at 79. The Supreme Court stated:

"It is wholly speculative now to foreshadow whether, or under what conditions, a member of the Party may in the future apply for a passport None of these things may happen. If they do, appropriate administrative and judicial procedures will be available to test the constitutionality of applications of particular sections of the Act to particular persons in particular situations. Nothing justifies provisioning those issues now."

Plaintiffs allege that they wish to travel abroad for recreation and study in pursuit of their profession as writers. They contend that section 6 of the Act is unconstitutional as applied to them for the following reasons:

- (1) Plaintiffs are deprived without due process of law of their constitutional liberty to travel abroad, in violation of the Fifth Amendment to the Constitution of the United States;
- (2) Plaintiffs' rights to freedom of speech, press and assembly are abridged in violation of the First Amendment.
- (3) A penalty is imposed on plaintiffs without a judicial trial, and therefore constitutes a bill of attainder, in violation of article I, section 9 of the Constitution;
- (4) Plaintiffs are deprived of the right to trial by jury as required by the Fifth and Sixth Amendments and article III, section 2; clause 3 of the Constitution; and
- (5) The action of the Secretary of State under section 6 constitutes imposition of a cruel and unusual punishment in violation of the Eighth Amendment.

The defendant admits all the material facts as alleged by the plaintiffs but denies that section 6 is unconstitutional. The defendant contends that the disqualification imposed [fol. 64] by section 6 is a valid regulatory device, reasonably drawn to meet the dangers of foreign subversion and

that it does not effect punishment for past activity but rather that it is a regulation of the activities of present members of the Communist Party necessary for the preservation of the Government.

It is admitted by both parties that if either plaintiff terminates his or her membership in the Communist Party that section 6 will no longer apply to him or her. They also agree that it would be a futile act for either plaintiff to apply for a passport or renewal of a passport until such membership is terminated. Indeed such application would be unlawful under section 6 of the Act as quoted above.

There is no contention that the administrative procedures provided by the defendant for determining plaintiffs' membership in the Communist Party were in any way inadequate or violated procedural due process.

The plaintiffs pray that the defendant be enjoined from enforcing section 6 of the Act and that defendant be ordered to reissue to each of them a valid United States passport.

The sole question to be decided by this Court is the constitutional validity of the section in question as applied to the facts of these cases. In order to properly decide this question it is necessary to view the enactment of the Subversive Activities Control Act of 1950 in its proper context.

In 1948 a Congressional Committee found that legislation was needed to

[fol. 65] " * * * cut the threads which bind the international Communist conspiracy together by restricting travel of members of the American section of the World Communist Movement."

H. R. 1844; 80th Cong., 2d Sess., dated April 30, 1948. The same thought was expressed in the debates which preceded enactment of the Internal Security Act of 1950, 64 Stat. 987 *et seq.*, 50 U.S.C. 781 *et seq.*, 94 Cong. Rec. 5850 and 5851; H.R. 2981, 81st Cong. 2d Sess., dated August 22, 1950.

The Congress found in Section 2(1) of the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U.S.C. 781(1), that

"[t]here exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a worldwide Communist organization."

The Congress also found in Section 2(6) of the Act that

"[t]he Communist action organizations so established and utilized in various countries, acting under such control, direction and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. * * *

The Congress further found in Section 2(8) of the Act that

"[d]ue to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives [fol. 66] in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement."

The Congressional findings contained in the 1950 Act are binding on this Court. As the Supreme Court stated in the case of *Communist Party v. Control Board, supra*, at 94-95, with respect to the Congressional findings relating to the nature of the world Communist movement and the threat it poses to the security of the United States:

"It is not for the courts to re-examine the validity of these legislative findings and reject them. See *Hari-*

siades v. Shaughnessy, 342 U.S. 580, 590. They are the product of extensive investigation by Committees of Congress over more than a decade and a half. [Footnote omitted.] Cf. *Nebbia v. New York*, 291 U.S. 502, 516, 530. We certainly cannot dismiss them as unfounded or irrational imaginings. See *Galvan v. Press*, 347 U.S. 522, 529; *American Communications Assn. v. Douds*, 339 U.S. 382, 388-389. * * *

In interpreting these same cases cited above, the Court of Appeals for the District of Columbia Circuit has stated,

"The rule, as we understand it, is that, if it appears Congress has power over the subject matter of a statute, and if the findings of fact are not baseless but are based upon extensive investigation, the courts are to adopt those findings." *Communist Party v. Subversive Activities Control Board*, 223 F.2d 531, 565 (1954).

The plaintiffs nevertheless argue that the findings made by the Congress in the Subversive Activities Control Act of 1950 as to the dangers threatening our Government by the world Communist movement, and upheld by the Supreme Court in *Communist Party v. Control Board*, *supra*, were made some thirteen years ago and may not be considered binding on the courts at this time. There has been no evidence offered or adduced that the "leopard" of the world Communist movement has changed a single spot in the past thirteen years nor would common sense nor common knowledge indicate any such change.

In addition, section 13(b) of the Act, 50 U.S.C. §792(b), contains the procedure whereby an organization which has been required to register by a final order of the Subversive Activities Control Board may seek the cancellation of such registration. On proper showing, the Board could cancel their prior registration order and the members of the organization would be under no impediment as to the use or issuance of passports. To our knowledge, the Communist Party has not sought to utilize the procedures under section 13(b).

The findings of the Congress made in section 2 of the Subversive Activities Control Act of 1950 are therefore as

valid and as binding on this Court today as on the day on which they were made. It is in the light of these congressional findings that the plaintiffs' claims of unconstitutionality of section 6 of the Act must be judged.

Denial of a passport to a citizen is a denial of the right to travel outside the United States. *Worthy v. Herter*, 270 F.2d 905 (D.C.Cir., 1959), *cert. den.*, 361 U.S. 918. "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." *Kent v. Dulles*, 357 U.S. 116, 125 (1958). The Supreme Court further noted in *Kent* that "[i]f that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress." *Id.* at 129. The Supreme Court in *Kent* did not review the constitutionality of the restrictions on travel involved in that case. It merely held that the Secretary of State did not have the authority to deny passports to citizens because of their alleged Communistic beliefs and associations and their refusal to file affidavits concerning their membership in the Communist Party when sections 2 and 6 of the Subversive Activities Control Act had not yet become effective. The Court said it would be

"strange to infer that pending the effectiveness of that law, the Secretary has been silently granted by Congress the larger, the more pervasive power to curtail in his discretion the free movement of citizens in order to satisfy himself about their beliefs or associations." *Id.* at 130.

It is clear in the present case that certain liberties of these plaintiffs, as alleged by them in their brief in these consolidated cases and in oral argument before this Court, are being restricted. Restriction or regulation of liberty, however, by no means indicates constitutional invalidity of the regulatory scheme. As the Supreme Court stated in *Communist Party v. Control Board*, *supra*, at 96-97,

"Individual liberties fundamental to American institutions are not to be destroyed under pretext of preserving those institutions, even from the gravest external dangers. But where the problems of accommodating

the exigencies of self-preservation and the values of liberty are as complex and intricate as they are in the situation described in the findings of §2 of the Subversive Activities Control Act—when existing government is menaced by a world-wide integrated movement which employs every combination of possible means, peaceful and violent, domestic and foreign, overt and clandestine, to destroy the government itself—the legislative [fol. 69] judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods. Especially where Congress, in seeking to reconcile competing and urgently demanding values within our social institutions, legislates not to prohibit individuals from organizing for the effectuation of ends found to be menacing to the very existence of those institutions, but only to prescribe the conditions under which such organization is permitted, the legislative determination must be respected. *United Public Workers v. Mitchell*, 330 U.S. 75; *American Communications Assn. v. Douds, supra.*"

In the *Douds* case cited, the Court upheld the validity of Section 9(h) of the National Labor Relations Act which denies the benefits of certain provisions of that Act to labor organization officers who have not filed non-Communist affidavits. The opinion, 339 U.S. at 390-91, states, "We think it is clear, in addition, that the remedy provided by §9(h) bears reasonable relation to the evil which the statute was designed to reach."

Such is the case here. In view of the findings by the Congress set forth above, we hold that the enactment by Congress of section 6, which prohibits these plaintiffs from obtaining passports so long as they are members of an organization—in this case the Communist Party—under a final order to register with the Attorney General; see 50 U.S.C. §786(g), is a valid exercise of the power of Congress to protect and preserve our Government against the threat posed by the world Communist movement and that the regulatory scheme bears a reasonable relation thereto. Under

circumstances such as these, our basic system of democracy permits the reasonable deprivation of the liberty of certain [fol. 70] of its citizens who are brought within the proscriptions of a legislative determination by due process of law. We further hold that the deprivation of liberty, such as it is as applied to these plaintiffs, is not a cruel and unusual punishment in violation of the Eighth Amendment, but is rather a reasonable regulation of conduct which bears a direct relation to the evil Congress has found inimical to the interests of the United States as a sovereign nation. See section 2(8) of the Act quoted above.

It is argued that substantive due process of law is denied the plaintiffs herein because section 6 of the Subversive Activities Control Act requires the denial of a passport upon a mere finding that the plaintiffs are members of the Communist Party and because the Act does not go further and require a determination that the plaintiffs do not wish to travel abroad simply for personal reasons of pleasure and recreation, but that they in fact intend to travel abroad for the additional purpose of carrying on activities to further the purposes of the world Communist movement. In other words, the plaintiffs argue that Congress may not conclusively presume that the plaintiffs, who have admittedly been lawfully determined to be members of the Communist Party, which in turn has lawfully been determined to be a Communist-action organization as defined in section 3(3) of the Act, 50 U.S.C. §782(3), will act as members of the Communist Party while travelling abroad. They say the defendant-Secretary must presume that they are travelling for purely innocent purposes unless procedures are provided [fol. 71] for determining their thoughts and intentions and it is affirmatively found that it is their thought and intention to act as members of the Communist Party and to carry on activities while abroad to further the purposes of the world Communist movement.

We hold that for Congress conclusively to presume that a member of a Communist-action organization while travelling abroad will act like a member of such an organization as defined by the statute—by carrying on activities to further the purposes of the world Communist movement which presents “a clear and present danger to the security of the

United States and to the existence of free American institutions," section 2(15) of the Act, 50 U.S.C. §781(15)—is not so unreasonable as to violate the plaintiffs' constitutional rights. We so hold in light of the Congressional findings set forth in section 2 of the Act, mindful of the peculiar and fundamental nature of those findings; and in light of the lawful procedures set forth in the Act, and followed in these cases before us, for determining whether an organization is a Communist-action organization and whether the individual citizens involved are knowingly members of such an organization.

The record in these cases, furthermore, shows that the plaintiff Flynn joined the Communist Party in 1937, has been a member of the National Committee of the Communist Party since 1938, and is currently the Chairman of the Communist Party of the United States of America. The plaintiff Aptheker joined the Party in 1939 and is presently Editor of *Political Affairs*, the self-described "theoretical organ of the Communist Party" of the United States. These facts are [fol. 72] undisputed for purposes of the motions for summary judgment before this Court on review of the administrative proceedings below. Thus these plaintiffs clearly have meaningful associations with the Communist Party in this country, to say the least. This fact negates, in these cases, any unknowing or naive relationship with the organization under a final order to register with the Attorney General of which these plaintiffs are members. The Congressional presumption therefore retains a notable vitality. See *Gastelum-Quinones v. Kennedy*, 31 U.S.L. Week 4637 (U.S. June 17, 1963); *Rowoldt v. Perfetto*, 355 U.S. 115, 120 (1957); *Galvin v. Press*, 347 U.S. 522, 528 (1954).

The plaintiffs contend that section 6 is a bill of attainder, but as was said in the *Douglas* case, 339 U.S. at 413-14:

" * * * in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to

be; but that does not alter the conclusion that §9(h) is intended to prevent future action rather than to punish past action.

"This distinction is emphasized by the fact that members of those groups identified in §9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past." [Emphasis in original.]

The same situation exists here: Section 6 would not be a bar to the issuance or use of a passport if the plaintiffs renounced their present membership in the Communist [fol. 73] Party. See also *Trop v. Dulles*, 356 U.S. 86, 95 (1958); *United States v. Lovett*, 328 U.S. 303, 315 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 356, 363 (1866).

In the instant case the restriction is not as severe as that in the *Douds* case, where the individuals were "subject to possible loss of position." Here, the plaintiffs are free to travel throughout the United States and most of the Western Hemisphere. The limitation on their right to travel is restricted to those countries which require a United States citizen to have a passport to enter their borders.

It was also stated in *Communist Party v. Control Board*, 367 U.S. 1, 86-87,

"The [Subversive Activities Control] Act is not a bill of attainder. It attaches not to specified organizations but to described activities in which an organization may or may not engage. *** Present activity constitutes an operative element to which the statute attaches legal consequences ***"

It is clear to this Court that section 6 of the Act is not penal nor is it a bill of attainder. It is instead a legitimate exercise of the authority of Congress to regulate the travel of members of Communist organizations, based on the legislative determination that such travel would be inimicable and dangerous to the security of the United States.

We therefore hold that the Constitution does not prohibit the denial of passports to plaintiffs as present members of

a Communist organization under section 6 of the Subversive Activities Control Act of 1950.

[fol. 74] Defendant's motions for summary judgment are granted as to each case.

The plaintiffs' motions for summary judgment in each case are denied.

The plaintiffs' requests for permanent restraining orders against the defendant are denied.

Leonard P. Walsh.

July 12, 1963

[fol. 75]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3478-62

ELIZABETH GURLEY FLYNN, Plaintiff,

v.

THE SECRETARY OF STATE, Defendant.

Civil Action No. 3886-62

HERBERT APTEKER, Plaintiff,

v.

THE SECRETARY OF STATE, Defendant.

ORDER—Filed August 2, 1963

The cause having come before the Court on cross-motions of the parties for summary judgment, and the Court having considered all of the pleadings and exhibits filed and having

heard the oral argument of counsel for each side, and the Court on July 12, 1963, having issued and filed its opinion, it is therefore by the Court this 2nd day of August, 1963:

Ordered that plaintiffs' motions for summary judgment as to each case be, and the same hereby are, denied; and that plaintiffs' requests for permanent restraining orders against the defendant be, and the same hereby are, denied; and it is

Further Ordered that the defendant's motions for summary judgment as to each case be, and the same hereby are, granted; and that the actions be, and the same hereby are, dismissed, with costs to the defendant.

Warren E. Burger, United States Circuit Judge.

G. E. Hart, United States District Judge.

Leonard P. Walsh, United States District Judge.

[fol. 76]

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 77]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF APPEAL OF HERBERT APTHEKER TO THE SUPREME
COURT OF THE UNITED STATES—August 9, 1963

I. Notice is hereby given that Herbert Aptheker, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order granting defendant's motion for summary judgment, denying plaintiff's motion for summary judgment and request for permanent restraining order, and dismissing the action, which order was entered in this action on August 2, 1963.

This appeal is taken pursuant to 28 U. S. C. §1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the

Supreme Court of the United States, and include in said transcript the entire record of this action, including this notice of appeal.

III. The following question is presented by this appeal: Whether section 6 of the Subversive Activities Control Act, 50 U. S. C. §785, is unconstitutional on its face or as applied to appellant.

Joseph Forer, Attorney for Herbert Aptheker, Plaintiff and Appellant, 711 14th St. N. W., Washington 5, D. C.

[fol. 78]

PROOF OF SERVICE (omitted in printing)

[fol. 79]

[File endorsement omitted]

**IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

[Title omitted]

**NOTICE OF APPEAL OF ELIZABETH GURLEY FLYNN TO THE
SUPREME COURT OF THE UNITED STATES**
—Filed August 9, 1963

I. Notice is hereby given that Elizabeth Gurley Flynn, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order granting defendant's motion for summary judgment, denying plaintiff's motion for summary judgment and request for permanent restraining order, and dismissing the action, which order was entered in this action on August 2, 1963.

This appeal is taken pursuant to 28 U. S. C. §1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record of this action, including this notice of appeal.

III. The following question is presented by this appeal:
Whether section 6 of the Subversive Activities Control Act,
50 U. S. C. §785, is unconstitutional on its face or as applied
to appellant.

Joseph Forer, Attorney for Elizabeth Gurley Flynn,
Plaintiff and Appellant, 711 14th St. N. W., Wash-
ington 5, D. C.

[fol. 80]

PROOF OF SERVICE (omitted in printing)

[fol. 81]

SUPREME COURT OF THE UNITED STATES

No. 461, October Term, 1963

[Title omitted]

Appeal from the United States District Court for the
District of Columbia.

ORDER NOTING PROBABLE JURISDICTION—December 2, 1963

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable jurisdiction
is noted.